Supreme Court, U.S.
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No. 00-491

In the

Supreme Court of the United States

STEVENS CREEK QUARRY, INCORPORATED,

Petitioner,

versus

SANTA CLARA COUNTY PLANNING COMMISSION, THOMAS TANNER; CHARLES REED; PAT SAUSEDO; MOHINDER MANN; BRENT VENTURA; NICOLAS HOLGUIN; DIANNE MCKENNA; MICHAEL HONDA; BLANCA ALVARADO; RON GONZALES; JAMES T. BEALL, JR.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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I. The Quarry's Contention is That it Pled a Valid Civil Rights Claim Based Upon an Alleged Violation of its Right to be Free of Governmental Coercion (Extortion) as Protected by Substantive Due Process.

The County in its brief tends to confuse exactly what the Quarry has alleged, despite the Quarry's extensive efforts to be absolutely clear about this matter in its Petition. Therefore, it appears necessary, for the sake of clarity, to restate with as much precision as possible exactly what the Quarry alleges to this Court. Put simply, it is the Quarry's contention that its right to be free from governmental coercion, which had as its purpose compelling the Quarry to renounce its vested rights, was violated by the County. In making this claim, the Quarry was not suggesting in any way that its property had been unconstitutionally taken, although that may also have been a by-product of the County's action. Instead, what was being put forth was that the course of conduct pursued by the County was constitutionally impermissible, regardless of its ultimate impact on the Quarry's property interest, because it amounted to nothing less than extortion. It was that unacceptable conduct *itself*, independent of its economic impact, that formed the basis of the Quarry's claim.

The Quarry's claim was formulated as a Fourteenth Amendment substantive due process claim because there is no precise constitutional provision, outside the criminal procedure context, which directly protects American citizens from being subject to undue governmental coercion amounting to extortion.[1] Had such a provision existed, that specific provision would have been cited, in much the same

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[1] Certainly, the Fifth Amendment explicitly prohibits the use of coercion in obtaining criminal confessions. Yet the absence of an explicit restriction against coercion in other contexts does not render the need for constitutional protection in those contexts any less significant.

way that First Amendment and Equal Protection violations are often made the basis of challenges brought in the land use field. That not being the case, the Quarry chose out of necessity to rely upon the more encompassing notion of substantive due process. In so placing its reliance, the Quarry was confident that, although the federal courts may be hesitant to expand the scope of liberties protected by substantive due process, at the very least that doctrine is sufficiently broad to provide a guarantee against extortion efforts by government. Still adhering to that view, the Quarry finds it odd that the County would suggest that the Constitution affords no such protection. Response Brief, p. 2.

II. The Ninth Circuit Court of Appeals Converted the Quarry's Substantive Due Process Claim Into a Takings Claim.

The basis of the Quarry seeking review from this Court arises from the fact that the Ninth Circuit Court of Appeals converted the Quarry's substantive due process claim into a takings claim, thereby rendering it a distinctly different claim then the one actually pled. In so doing, the Ninth Circuit placed reliance upon the notion that there can never be a substantive due process claim in the land use field since all such claims are merely "dressed-up" takings claims. Ultimately, the Ninth Circuit concluded that:

> The Quarry also contends that the County violated "its substantive due process rights" when it modified the use permit. This claim is characterized by a charge of outrageous conduct that is *akin to a takings claim*. Here, the Quarry never attempted to show that its operations under the modified use permit would no longer be economically feasible. Thus, even construing the allegations of the

> complaint in the light most favorable to the Quarry, the Quarry still fails to state a claim for a violation of substantive due process.

Petition, Appendix, p. 3a (emphasis added). Based upon this language, it is clear and unequivocal that the Ninth Circuit concluded that, in order to state a valid claim, the Quarry would have had to plead that the County's outrageous conduct had resulted in it being deprived of its property. Put slightly different, the Ninth Circuit's position amounts to a conclusion that the claim of outrageous conduct advanced by the Quarry was not in and of itself actionable, but is instead actionable only to the extent that it adversely affects a property interest, i.e., only to the extent that it negatively impacts an economic interest.

As the Quarry has, however, previously asserted to this Court, this position leaves the Quarry with no recourse for the actual outrageous conduct itself. Clearly, if this position is allowed to prevail, it amounts to a determination that governmental extortion is permissible so long as it does not result in a taking. Assuming that there is a right to be free of government-based extortion, this result seems untenable because it has the true potential of virtually obliterating the guaranteed right itself. Furthermore, if the constitutional right, the right to be free of governmental extortion, is cognizable in the land use context only if and when there is a taking, what logically prevents this doctrine from being extended to land use claims when alleged infractions of First Amendment or Equal Protection rights? The absurdity of such an extension is relevant, not so much because it is a real possibility, as it is an apt illustration of the core problem with the doctrine which the Quarry is requesting that this Court review.

III. The County Fails to Understand the Quarry's Claim and Accordingly Repeatedly Makes Irrelevant Arguments.

In its brief, the County states that "the precise basis of the Quarry's request for review is unclear." Response Brief, p. 2. The Quarry would submit that the difficulty addressed by the County stems less from the Quarry's lack of clarity and more from County's own failure to understand the claim being put forth by the Quarry. Nowhere is this lack of understanding more apparent than in the portion of the County's brief where it seeks to assert that no conflict exists between the circuits. In the opening paragraph of that section, the County indicates that the Quarry is looking for inconsistencies between the position taken by the Ninth Circuit Court of Appeals and the proposition, which the County quotes from the Quarry's brief, that "property rights can be implicated, and violated, in the land use context." Response Brief, p. 8. The only problem with this quote, however, is that it is a partial quote which, as employed by the County, completely distorts what was actually stated by the Quarry—doing so, in fact, in a fashion which completely reverses what the Quarry was actually asserting.

The actual language employed by the Quarry was as follows: "that *rights other than* property rights can be implicated, and violated in the land use context." Petition, p. 6. As this accurately quoted phrase makes clear, what the Quarry in seeking review was focusing upon—and indeed what constitutes the core of its claim—is the notion that other rights, and not just property rights, can be and are implicated in the land use field. Among those "other rights" the Quarry believes are implicated, and which ought to be protected, is the right to be free from governmental extortion. The County's failure to understand this most basic point relating to the Quarry's request for review from this Court is reflected in its use of the partial and inaccurate quote referenced

above. Furthermore, to formulate the issue as did the County seems rather nonsensical since presumably no one would contest the rather simple proposition that property rights are implicated in the land use context. The Quarry's overall assertion, however, is that much more than just property rights is implicated in the land use field and that, by converting the Quarry's substantive due process claim into a takings claim, the Ninth Circuit failed to recognize that fact and provide appropriate recourse.

The County's failure to recognize the actual nature of the Quarry's basis for seeking review has serious implications for several arguments made in its brief. Obviously, one of the areas which is rendered troublesome relates to the County's critique of the Quarry's suggestion that there is a conflict between the circuits regarding the proper role of the doctrine of substantive due process in the land use field. This whole discussion is, however, rendered less than cogent by the very fact that the County has mischaracterized the position with respect to which there is a lack of consistency. The reality is that the cases cited in footnote 4 of the Quarry's Petition do, in fact, indicate a lack of consistency between the position taken by the Ninth Circuit in this case and the general position put forth to this Court by the Quarry and subscribed to by other circuits.[2]

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[2] It is the reasoning, not the facts, of the cases discussed in footnote 4 that is significant. Thus, although the claim in *Bickerstaff Clay Products, Inc. v. Harris County* differed from Quarry's, the Eleventh Circuit nonetheless made clear that substantive due process claims may go forward and that they are separate and distinct from takings claims. 89 F.3d 1481, 1490 n.16 (11th Cir. 1996). Likewise, despite the factual differences in *Tri County Industries, Inc. v. District of Columbia*, the D.C. Circuit spoke broadly in that case, holding that "the requirements of the takings clause cannot be said to exhaust the Fifth Amendment's substantive protection . . . ." 104 F.3d 455, 459 (D.C. Cir. 1997). Finally, while the Fifth Circuit in *John Co. v. City of Houston* dealt with a claim different from Quarry's, it noted, "a blanket rule . . . that . . . the Takings Clause subsumes any substantive due process claim relating to a deprivation of property is both

Another aspect of the County's brief which is adversely impacted by its failure to understand the Quarry's claim is its discussion of this Court's recent decision in *Village of Willowbrook v. Olech*, 120 S. Ct 1073 (2000). The Quarry offered that case as illustrative of the fact that this Court, as recently as this year, recognized that non-property rights can be implicated in the land use field—in that case a right of equal protection of the laws. *Id.* at 1074. As a result of not fully recognizing what the Quarry is asserting, the County dismisses *Olech* as irrelevant on the basis that it is factually distinguishable, which of course it is. Response Brief, pp. 10-11. The cited factual distinctions, however, do not render the decision inapplicable for the purpose for which it was cited since it reflects this Court's awareness of the existence of protected non-property based rights occurring in the land use context. Similarly, the County's attempt to dismiss the Quarry's reliance on *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), and *United States v. Lanier*, 520 U.S. 259 (1997), on the basis of factual distinctions is unfounded. Response Brief, p. 10. Both of these cases illustrate well that this Court recognizes the existence of substantive due process guarantees, albeit in areas outside the land use context. *See Lewis*, 523 U.S. at 843; *Lanier*, 520 U.S. at 272 n.7 A central issue in this case, moreover, is whether this Court should choose to build upon these cases as well as *Olech* to clarify that fundamental rights protected by substantive due process are applicable in the land use context just as they are elsewhere. A narrow fact-based reading of cases as urged by the County, of course, deflects attention from this central issue and should accordingly be avoided.

IV. The County Misrepresents the Contents of the Memorandum Issued by the Ninth Circuit Court of Appeals in an Effort to Suggest That the Court of Appeals Did Not Convert the Quarry's

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inconsistent with our precedents and with the approach taken by a majority of other circuit courts." 214 F.3d 573, 583 (5th Cir. 2000).

Substantive Due Process Claim Into a Takings Claim.

Throughout its brief, the County repeatedly asserts that all the Ninth Circuit Court of Appeals did in its Memorandum Disposition was conclude that the Quarry had failed to put forth a valid substantive due process claim. Response Brief, p. 7. Nothing, however, could be further from the truth as the very contents of the Memorandum Disposition reveal. Had the Ninth Circuit done as the County suggests, it would have had to conclude that there is no substantive due process right to be free from governmental extortion. Unfortunately for the County, the Memorandum contains no such conclusion. If it had, the Quarry would have appealed to this Court on that basis since it finds it inconceivable that a court would be willing to assert that governments in the United States are, consistent with constitutional principles, free to engage in activities characterized by extortion. As it was, the Ninth Circuit was quite clear about what it did: namely, it declared that the Quarry's substantive due process claim was "akin to a takings claim," thereby converting into an as yet unfiled takings claim. Petition, Appendix, p. 3a. The attempt of the County to limit the holding of the Ninth Circuit is accordingly without merit.

Interestingly enough, even the County has a difficult time maintaining its position regarding the narrowness of the holding provided by the Ninth Circuit. As the County observes, "Again, the Memorandum was limited to whether the Quarry had stated a substantive due process claim. The decision merely indicated that the allegations made by the Quarry were more akin to a takings claim." Response Brief, p. 8. Obviously, the second of these two sentences, which unlike the first actually paraphrases what the Ninth Circuit stated, undoes the first—leaving it clear that what the Court actually did was convert the Quarry's substantive due process claim into a takings claim. This situation is even more

apparent elsewhere in the County's brief where it indicates essentially that the Quarry's substantive due process claim was dismissed because it had failed to plead that its operations would no longer economically feasible. Response Brief, p. 7. That standard of economic infeasibility is obviously the one employed in assessing whether a taking has occurred—a fact which again illustrates precisely what the County wishes to avoid: namely, that what the Ninth Circuit did was convert the Quarry's substantive due process claim into a takings claim. Had this not been the case, there would have been no reason for the Ninth Circuit to employ a takings standard when indicating what was missing from the Quarry's pleadings. In any event, it is worth noting the actual wording employed by the County since it reveals the weakness of its own position:

> The Quarry misconstrues the Ninth Circuit's Memorandum. Rather, the Ninth Circuit merely held that the Quarry's characterization of its particular charge of "outrageous conduct" based on the modification of its use permit as a substantive due process violation "is akin to a takings claim." Petition at 17a. The Ninth Circuit Memorandum explained that the [Q]uarry's claim was insufficient because "the Quarry never attempted to show that its operations under the modified use permit would no longer be economically feasible."

Response Brief, p. 7.

Even the County's own remarks, therefore, fail to support its contention that the Quarry has misconstrued the Ninth Circuit Memorandum. The actual situation is that the wording of that Memorandum is quite clear and that it reveals that the Ninth Circuit converted the Quarry's substantive due process claim into a takings claim, thereby leaving the

Quarry with no actual recourse for the violation of its right to be free from governmental extortion. Indeed, much though the County wishes to argue to the contrary, this fact is simply inescapable and undeniable. It forms, moreover, the basis of the Quarry's request that this Court review and determine whether it is constitutionally permissible to totally eliminate the doctrine of substantive due process from the field of land use law.

V. This Case Presents This Court With the Opportunity to Clarify the Doctrine of Substantive Due Process as it Applies in the Field of Land Use Law and Therefore the Quarry Respectively Requests That Review be Granted for That Purpose.

As the Quarry observed in its Petition, the doctrine of substantive due process as applied in the land use context has two separate and distinguishable components: namely, one component involving the fact that land use regulations involve economic interests and another revolving around the notion that there are certain non-economic fundamental rights which are not specifically enumerated in the Bill of Rights. Petition, p. 9. In its Memorandum, the Ninth Circuit Court of Appeals confuses these two components, concluding essentially that only economic rights can be violated in the land use context. Doctrinally, this confusion has resulted in the Ninth Circuit in this case converting the Quarry's substantive due process claim into a takings, i.e. economic, claim. Elsewhere, other circuits have recognized the non-economic aspects of substantive due process as has this Court in other situations. *See, e.g., Moore v. City of East Cleveland*, 431 U.S. 494, 502-03 (1977); *Arlington Heights v. Metro. Housing Dev. Co.*, 429 U.S. 252, 267(1977). This inconsistency in doctrine accordingly needs to be recognized and resolved so that fundamental non-economic rights of American citizenship are not rendered inapplicable merely because of the subject matter context in which a violation

may occur. In addition, review of this case will present this Court with an opportunity to review and elaborate upon the two distinct aspects of the doctrine of substantive due process as they apply in the land use field. Indeed, although this Court has in recent years rendered several important opinions regarding the takings aspect of land use law,[3] the substantive due process doctrine has essentially been left untouched in the land use context for considerably over half a century.[4] It is for this reason that the Quarry respectfully requests that this Court grant certiorari so that relevant guidance regarding this doctrine and its applicability to the land use field may be provided.

Respectfully submitted,
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[3] *See Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. So. Carolina Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

[4] Since the late 1930s, courts have predominantly, when resolving land use issues, interpreted footnote 4 of *United States v. Carolene Products* as virtually eliminating from Constitutional jurisprudence the notion that the doctrine of substantive due process may be invoked to protect economic interests. 304 U.S. 144, 152 n.4 (1938). In fact, the almost universal rule which has emerged is that minimal judicial scrutiny is all that is required in such situations. *See generally* Norman Williams & John M. Taylor, *American Land Planning Law*, § 5.01 (Rev. ed. 1988). This notion of substantive due process needs, however, to be sharply distinguished from that doctrine as employed by the Quarry to assert the existence and violation of a non-economic right. It is this distinction, which the Quarry has sought to draw throughout its Petition and this brief, that the Quarry believes warrants further exploration and clarification by this Court.